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Rosner, N.

Published in:
Tijdschrift voor onderneming en strafrecht

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Document Version
Publisher's PDF, also known as Version of record

Publication date:
2001

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):
Rosner, N. (2001). Jurisdictional issues in international e-commerce contracts. *Tijdschrift voor onderneming en strafrecht*.

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**University of Groningen, Faculty of Law
Department of Private and Notary Law**

Jurisdictional Issues in International E-Commerce Contracts

by Norel Rosner LL.M., Assistant research fellow



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I. Introduction

“These changes, the most significant since the Industrial revolution, are far-reaching and global. They are not just about technology. They will affect everyone, everywhere.”¹ This is the language used by European Commission’s president in order to describe the impact of Information and Communication Technology (“ICT”) on the society as a whole. However, one cannot overlook the fact that this impact *will* occur in the future and has yet to reach our surroundings. Indeed, if we were to have a quick look at the statistical data, we may notice that the total worth of European e-commerce markets in 1999 was only 18 billions Euro, a modest 17% from the 104 billion Euro, the value of the world-wide e-commerce market².

The current situation is in need, therefore, of immediate improvement. Otherwise, one may only wonder if the new revolution “will affect everyone, everywhere”. The tackling of this issue necessitates an approach directed to three separate aspects: Firstly, efficient measures should be taken in order to make *technology accessible*. Secondly, the current *business-consumers practices* have to be adapted to the requirements of a virtual market. Finally, in order to ensure the certainty and uniformity of laws regulating this new environment, which in turn will promote the public trust needed for progress in this area, a framework of efficient legal rules should be adopted.

It comes almost without saying that the current article will focus only on the latter issue, namely legislative aspects. At the same time, it might be of relevance to mention that while e-commerce poses a number of legal problems, the space available for this analysis does not allow, unfortunately, to treat all these aspects. Indeed, one has to differentiate between three important issues related to e-commerce: Firstly, there are intellectual property matters. Secondly, one can encounter issues related to privacy. Finally, there are important considerations about choice of law and choice of forum to be taken into account, of course mainly in contracts involving international elements.

¹ See Romano Prodi, Introductory remarks for “eEurope”, a European Commission program designed at speeding up the uptake of digital technologies across Europe, at http://europa.eu.int/comm/information_society/eeurope/index_en.htm

² See Booz-Allen & Hamilton and the Ministry of Economic Affairs of the Netherlands, The Competitiveness of Europe’s ICT Markets-The crisis amid the growth, p. 24, at <http://www.minez.nl/>

The purpose of this article is to consider the latter important aspect of international contracts concluded through electronic means, namely the question which forum has jurisdiction to try potential conflicts that may arise from such contracts. When attempting to supply an answer to the above-mentioned question, I shall first try to define the term e-commerce. Subsequently, several specific issues for e-commerce contracts will be identified and then possible solutions will be offered in the light of two recent legislative developments at the European level. Finally, the concluding thoughts will suggest possible solutions based on a recently adopted legislative act.

II. What is e-commerce?

It is a rather difficult task to provide a precise definition of the term e-commerce. The literature on this subject contains various descriptions, ranging from broad and extensive to rather concise and simple formulations. In the following lines I will mention a number of such definitions with a view to provide an as accurate as possible picture.

In a paper published by the European Commission in order to describe the nature of e-commerce and to identify several issues on this area, the definition used includes:

“any form of business transaction in which the parties interact electronically rather than by physical exchanges or direct physical contact.”³

Meanwhile, the Ministry of Economic Affairs of the Netherlands published in 1998 a policy paper designed at expanding and improving the use of e-commerce. This plan refers in its turn to electronic commerce as covering:

“ all business transactions that are carried out electronically with a view to improving the efficiency and effectiveness of market and business processes.”⁴

³ See European Commission, Electronic Commerce-An Introduction, at <http://www.ispo.cec.be/ecommerce/answers/introduction.html>

⁴ See the Ministry of Economic Affairs of the Netherlands, Electronic Commerce Action Plan, The Hague, March 1998, p. 7, at <http://www.minez.nl/>

One of the most concise definitions for e-commerce, specific for the dynamic world of business, has been suggested by Mr. A.P. van Kerckhoven, product development-manager at World Online International, a leading Dutch Internet provider:

“E-commerce is the use of telecommunication and computers in order to support trade.”⁵

From the aforementioned definitions we may infer a number of factors that seem to appear on more than one occasion: Firstly, e-commerce presupposes the existence of a business transaction. Secondly, the parties to such a transaction will maintain contact through electronic means rather than conventional ways of communication. Lastly, e-commerce is designed at creating a more efficient business environment.

Having established that, it is quite obvious that e-commerce is not limited to Internet. It includes rather all business transactions carried out through electronic means; Such is the case, for instance, with the so-called Electronic Data Interchange transactions (“EDI”), developed in the 1980’s in order to support transactions between suppliers and customers, or with teleshopping and pay television. Nevertheless, e-commerce has known a remarkable expansion only with the establishment of the Internet as a communication protocol available on a large scale. This article is thus limited in scope to jurisdictional issues arising out of contracts concluded through Internet, indeed one of the fastest growing environments where e-commerce is being conducted. In fact, in a definition of e-commerce recently used in a working paper of the European Commission, it is only the Internet that is mentioned as the medium where transactions are being concluded:

“E-commerce, the buying and selling of goods and services using the *Internet*.”⁶

⁵ From a presentation held with the occasion of the conference entitled “*De invloed van informatietechnologie op het recht*”, Rotterdam, 23 March 2000

⁶ See European Commission, working paper eEurope, an Information Society for All, at http://europa.eu.int/comm/information_society/eeurope/objectives/area03_en.htm

III. Categories of e-commerce

Electronic transactions may be concluded between various parties: Private enterprises, consumers or public authorities. Depending on the parties participating in the transaction, e-commerce can be subdivided in four distinct categories⁷:

- Business to business transactions involving performance against payment or performance against performance (for example when one party supplies statistical data in exchange for the results of a market research).
- Business to consumer transactions involving the purchase of products by individuals outside their trade or profession. An additional term used to describe this category is *electronic retailing*.

These first two categories may also be classified under the heading *electronic trading*.

- Business to administration transaction is a category which finds itself in an incipient stage. It involves commercial relations between companies and public bodies, for example following a government procurement contract.
- The consumer to administration category has only recently emerged and is of a rather limited application. However, one can imagine that a certain degree of efficiency and effectiveness can be added to government activities if a number of such operations will be concluded on-line (for example in welfare payments or tax matters).

At this stage of its development, the most important categories of e-commerce are the first two above mentioned. The share of the other two categories is negligible in the larger context of global e-commerce. However, with the emergence of the World Wide Web and the relative easy accessibility to its services, the proportion between the share of business to business and business to consumer transactions has been dramatically shifted in the past three years. If this proportion was of ten to one⁸ in 1996 at a global scale, it reached in 1999 40%/60% in the United States and 31%/69% in the European Union⁹.

⁷ On this issue see also note 3, *supra.*, at p. 3

⁸ See note 4, *supra.*, at p. 8

⁹ See note 2, *supra.*, at p. 24

It is due to these fast changes that the newly spotted legal issues in these respective areas should be treated with priority. In particular, in contracts involving consumers, steps should be taken to allow for the protection of this rather exposed category. Henceforth, the remarks to follow are to describe choice of forum issues in this category, as well as in business to business transactions.

IV. Jurisdiction in business-to-consumer e-commerce contracts

As noted above, approximately one third of today's world e-commerce is conducted between businesses and consumers. Due to the rapid growth of the numbers of private households connected to Internet, one can reasonably expect that this percentage will continue to increase. Under these circumstances, the question arises which court has jurisdiction to try international conflicts arising from consumer contracts concluded through Internet. Will the same rules applicable to conventional consumer contracts apply? Or should other considerations be taken into account?

A necessary distinction

In answering this question, it is my intention to first explain one legal peculiarity posed by e-commerce. To be more precise, a basic distinction has to be made according to the nature of the obligation to be performed. As a consequence, we may identify two categories of electronic commerce: On one hand there is the trade with *physical goods and services* and, on the other hand, the trade with *electronic materials* (software, images, voice, text etc.). This basic distinction leads to a further division of e-commerce contracts: In the former case, the Internet is being used as the medium to communicate and sometimes to even conclude a contract, while in the latter event the Internet represents *the place where the performance takes place*. In other words, while in the first case the contract is concluded by using electronic means but the performance takes place outside the electronic environment, in the second instance the whole transaction, from the moment an offer is being made and until the obligation in question is being performed, can be located on the same network.

Having established this basic distinction specific to e-commerce, I shall now proceed to describe some jurisdictional rules as established in the yet-to-be adopted Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters¹⁰ (hereinafter the “Brussels regulation”). This is a revised version of the 1968 Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgements¹¹ (hereinafter the “Brussels Convention”). This step is being pursued as a result of the inclusion¹² of the subject-matter of this instrument, namely recognition and enforcement of foreign judgements in civil and commercial matters, in the home and justice affair pillar of the European Union. Besides the interests in more uniformity of law, the reason that prompted the adoption of an updated version of the Brussels Convention has to do also with the appearance of new forms of commerce non existent in 1968, one of them being of course e-commerce.

The regulation maintains in article 2 the general jurisdictional rule according to which defendants domiciled in one of the Contracting states shall be sued at the place of their domicile. However, just like the initial Brussels Convention, the act contains special jurisdictional rules for consumer contracts, that is for contracts concluded outside a trade or profession. Therefore, according to article 16 of the regulation, a consumer domiciled in a Contracting state has the choice of suing the other party either before the court of the place of his or her domicile or in the Contracting state where the other party is domiciled. The question that arises is whether e-commerce contracts, whereby the offer is not directed specifically to the country of the consumer but rather to a global audience, can be included in this category. In other words, can a company from the Netherlands selling products through an interactive web-site reasonably expect to be sued in any of the Contracting states where consumers are domiciled?

The solution offered by the new Brussels regulation does not leave place for any doubts; Accordingly, the drafters of this legal act have chosen to allow for the prevalence of consumers’ interests at the detriment of the industry. The language used in article 15 (3) is thus very clear in stating that jurisdiction is covered by this section when:

“... the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such

¹⁰ See Commission Proposal COM (1999), 348 final, Brussels, 14.07.1999, OJ No C266 p.2, 21.09.1999

¹¹ See EC Bulletin 1969, Supplement No. 2, p. 17

¹² See Article 65, Treaty of Amsterdam, Official Journal C 340, 10.11.1997, p. 145-172

activities to that Member State or to several countries including that Member State, and the contract falls within the scope of such activities.”

Moreover, the former condition included in article 13(3)b of the original Brussels Convention according to which the consumer has to take the necessary steps for the conclusion of the contract in the State of his or her domicile has been omitted from the new text. As a result, one could reasonably expect that, as long as a consumer has his or her permanent domicile on the territory of a Contracting state, the e-commerce contract can be concluded not only from this domicile in one of the Union states, but also while the person in question is on a business trip to, let us presume, Japan. Of course, in such a case one condition is that the web-site where the goods or materials are being advertised would be available in the Contracting state where the consumer has his or her domicile.

It should be also noted that in order to trigger the protection of these jurisdictional rules the fact whether the object of transaction is physical goods or services or electronic materials is irrelevant. The only two conditions that make article 15 applicable are domicile in one of the Contracting States and conclusion of the contract outside the trade or profession.

As a consequence, the answer to the above mentioned hypothetical question would be that, indeed, an Internet company based in the Netherlands could reasonably expect to be sued in any of the Contracting states where its web-site is available. The only way to avoid such a situation is to clearly state that the products are not intended for a certain market.

The solution adopted in the Brussels regulation draft has given rise to a certain amount of criticism from the European computer industry¹³. The main criticism relates to the uncertainty that this provision will trigger. As a result, a European company trading through the Internet will face even lesser protection with the adoption of the new regulation, a result certainly not in line with the general interest in promoting e-commerce throughout the European Union.

This solution conflicts with the opinion expressed by some authors¹⁴ according to whom the consumers should be afforded protection only when they are the passive factor, i.e. they do not employ any effort to reach the other party. In this instance, the consumer is being rather sought in the country of his or her domicile and, according to the same authors, the rules of the legal system most closely connected to that consumer, in this case those of the place of

¹³ See Explanatory Memorandum, Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, Commission Proposal COM (1999), 348 final, Brussels, 14.07.1999, at p. 17, OJ No C266 p. 2, 21.09.1999

¹⁴ See for example Katharina Boele-Woelki, *De functie van het IPR bij Internet-geschillen*, *NJB* 5 June 1998, at p. 1028

domicile, should be applicable. According to the same opinion, consumers parties to e-commerce contracts cannot be considered passive since the very fact that they surfed the Internet in search for a certain product makes them active. As a consequence, following this rationale, the protection afforded by article 15 above described is not to cover consumers in e-commerce contracts.

The opinion is, of course, open to criticism. Some authors simply name it “bad law”¹⁵. I would tend to consider that such a consumer is entitled to special protection. We cannot compare a consumer in an Internet contract with someone who travels to another country and, for example, purchases an automobile because of the lower price. This is my idea of an active consumer. Someone surfing on the Internet sitting comfortable at home may, at best, be called a curious person, but certainly not an active consumer. I would therefore be of opinion that such a consumer is entitled to receive the protection of his home forum.

Of course nobody denies that in such a case problems will arise due to the uncertainty that this solution will cause for Internet companies. They are running indeed the risk of being sued in each Contracting state where they sell their products. However, this issue can be tackled by using other methods than denying consumers’ protection. One solution would be to mention on the web-site in question that the offer of products or services is not intended for sale in certain countries¹⁶. Another viable solution would be to insert in the contract a provision for choice of forum combined with a provision for choice of law. However, such a step can be taken only after the dispute has arisen (article 17(1) Brussels regulation).

The complexity of establishing domicile

Another issue to be discussed in this context is connected with the establishment of the domicile of the defendant. According to article 15 of the Brussels regulation, the provision of this article shall not interfere with the application of article 4. This last provision establishes the rule according to which if the defendant is domiciled in a third country the *Jus Commune* of the plaintiff’s Contracting state is applicable. Accordingly, we may infer that article 15 is applicable only if the defendant is domiciled in a Contracting state. For the defendants domiciled outside the European Union article 4, thus national jurisdictional rules, will apply. At the same time, the domicile of a company or a legal person is established, according to the

¹⁵ See Herbert Kronke, Applicable Law in Torts and Contracts in Cyberspace, in Katharina Boele-Woelki and Catherine Kessedjian, *Internet Which Court decides? Which Law applies? Quel tribunal decide? Quel droit s’applique*, The Hague, 1998, at p. 83

¹⁶ See also the Explanatory Memorandum, at p. 17

newly introduced article 57, either where “it has its statutory seat, central administration, or principal place of business.” The problem with Internet companies is that often these coordinates are very difficult to be established. There are countries, the so-called Internet-paradises, where the identity of the owner of an Internet site is treated in the same manner as the bank or the correspondence secrecy. Moreover, sometimes the principal place of business of such a company, especially if it sells electronic materials, is rather difficult, if not impossible, to be established.

In such a case one cannot cite any legal rules that can govern such a relationship. A court seized with such a case may establish the domicile of such a company using other elements such as the extension of the domain name, for example .nl (Netherlands) or .de (Germany). If, however, this extension does not bring any clarification (it might also be .com or .net) then other elements can become relevant such as the language of the Internet site or the currency in which the prices are mentioned.

The updated version of the Brussels Convention, most probably to enter into force during the year 2000 or early in 2001, will undoubtedly bring necessary adjustments to the original text. However, while consumers are afforded a necessary protection, the European legislator should reach in the future a balance between the interests of the latter category and the legitimate concerns of the industry.

V. Jurisdiction in business-to-business e-commerce contracts

If consumers enjoy a privileged status, the rules applying to contracts concluded in the framework of a trade or profession, the so-called business-to-business contracts, are of a different nature. In fact, the revised version of the Brussels Convention does not provide specific jurisdictional rules to be applied when concluding an e-commerce business-to-business contract. As a consequence, I shall attempt in the following lines to provide several solutions based on the already existing rules.

Accordingly, the main jurisdictional rule of the Brussels Convention, preserved in the to be adopted EC Council regulation, states that defendants domiciled in a Contracting state, whatever their nationality, shall be sued in the courts of their place of domicile (art. 2). If, however, the defendant is domiciled in a third country, then the respective national rules of each of the Contracting states will apply (art. 4). Since business-to-business contracts are concluded mainly by companies or legal persons, the act refers us to the new article 57 for the

definition of the term “domicile” as applicable to these parties. In accordance to this latter provision, the domicile is to be established having due regard, alternatively¹⁷, to the place where the company or the legal person “has its statutory seat, central administration, or principal place of business.”

The problem that appears when dealing with e-commerce is that seldom these co-ordinates are rather difficult to be established. Since these three criteria are alternative, the finding of any of the above will suffice to conclude that a company or a legal person is domiciled in a certain territory. However, as it has been stated above in the previous section, Internet companies can, at times, be difficult to locate. They might either have their statutory seat and central administration in a so-called Internet-paradise country, whereas the principal place of business may be in the electronic environment, especially if they focus on trade in electronic materials. In this case, the court seized with such an issue may use a number of other criteria in order to establish the domicile of such a company or legal person: The extension of the domain name, the language of the web-site and the currency used to express the prices of their offer. The problem would appear, of course, if the extension would be, for example .com, the language of the site English and the prices stated in US Dollars and/or Euro. In such a case, one should turn to the alternative jurisdictional rules contained in article 5 of the Brussels regulation.

Nevertheless, it should be noted that the alternative jurisdictional grounds apply *only* to the extent that the defendant is domiciled in one of the Contracting states. If the solution provided above for the establishment of the domicile of a company or a legal person in Contracting state or in a third country will not suffice, than probably the only remaining solution is to turn to the national rules of private international law. Alternatively, one would expect that an interpretation judgement on this issue would be rendered sooner rather than later by the European Court of Justice at Luxembourg.

Turning to the provisions of article 5, the first paragraph establishes the general jurisdictional rule in matters related to contracts according to which the courts of the Contracting states of the place of performance are competent to adjudicate in such conflicts. Further in the same paragraph it is stated that in a contract for the sale of goods or the provision of services jurisdiction belongs to the courts of the place where the goods were delivered or should have been delivered or, in case of service provision, in the courts of the Contracting state where the services were provided or should have been provided. This seems to be a satisfactory

¹⁷Ibid., at p. 24.

provision, able to clarify, to a certain degree, the above-mentioned dilemma. In other words, provided that the contract is for the supply of physical goods or provision of services, the article under analysis in this paragraph is applicable to business-to-business e-commerce contracts.

However, if the contract is for the sale of electronic materials (software, images, voice, text, etc.), the foregoing provision can be hardly applicable. In such a contract, the place where the performance takes place, or, to be more specific, where the materials are being delivered, may be located only after considerable efforts. Even when attempting to construe article 5(1)b in an extensive manner, thus considering electronic materials as being assimilated to goods¹⁸ or services, the place of delivery is quite difficult, if not impossible, to be established: Is it the place where the supplier enters the data in the hardware of a computer or the place where the data is downloaded. What if, in a contract between two companies, one Dutch and the other English, the electronic material is being downloaded from a laptop while the person responsible for this activity is on a business trip to Greece? Will this mean that the court of the latter state can try a conflict arising from such a contract? The scarcity of rules in this area causes the answer to such questions to be open for interpretation. In particular, the problem arises because such materials can be downloaded anywhere in the world.

In other words, the place of performance in such a case is difficult to be established. If, let us presume, the difficulties encountered when attempting to establish the domicile of a company or a legal person occur when the contract in question stipulates the delivery of electronic materials, then the solutions are not to be found in the above analysed provisions. Instead, in such complicated cases, the most viable solution would be to introduce a choice of forum clause, in accordance to article 23 of the new Brussels regulation.

If at least the domicile of one party can be established in a Contracting state, than a choice of forum clause can be included in the contract. The jurisdiction established in accordance to article 23 might be exclusive, unless the parties agree otherwise. In addition, the EC regulation contains specific provisions aimed at according the same legal value to agreements on choice of forum concluded in writing and the ones agreed upon through electronic means¹⁹.

¹⁸ See K. Boele-Woelki, *Conflictenrechtelijke aspecten van Internet-koop-overeenkomsten*, in Molengrafica, 1997, at p. 139-165.

¹⁹Article 23, Paragraph 3 of the Brussels regulations reads as following:

“Any communication by electronic means which can provide a durable record of the agreement shall be deemed to be in writing.”

Indeed, many of the problems analysed above can be easily avoided if such a clause is being included in a contract for the sale of physical goods, electronic materials or provision of services. Such a choice may express preference for the courts of a Contracting state, thus in accordance to the Brussels regulation, or for an out-of-court dispute settlement arrangement, in accordance with the recently adopted European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market²⁰ (hereinafter the “Directive on electronic commerce”).

VI. Out-of-court jurisdiction

Compared to other categories of trade, e-commerce presents a number of specific features: Perhaps one of the most evident is the speed in which transactions are being concluded. Especially when electronic materials are being purchased, the simple downloading of the software in question can last for only a few moments. Another feature, of course, is that due to Internet’s global accessibility, a company or legal person offering goods, services or electronic materials by using this medium can reasonably expect to sell products world-wide. At the same time, companies or legal persons active on the Internet may at times be difficult to trace according to traditional criteria, i.e. statutory seat, central administration or principal place of business.

Considering these special features presented by e-commerce, settlements of disputes in courts might not constitute always the most suitable option. It is a well known fact that court procedures last very often for quite a long time, even when the issues concern conventional contracts. One could hardly imagine that for a contract in which the performance has been completed in a few minutes the parties will tolerate having to wait for a few months, or sometimes even longer, for a judgement to be rendered.

Likewise, besides the importance of the rapidity of conflict resolution, companies or legal persons trading on the Internet might prefer to save the costs which any court dispute, especially in a foreign country, entails. This statement is even more valid if we take into account the fact that the probability to be sued in a foreign country is quite high in these cases.

²⁰ See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal market (“Directive on electronic commerce”), *Official Journal L 178*, 17/07/2000, p. 0001-0016.

Finally, regular courts might not be always the most competent forum to assess and decide in certain issues strictly connected to this category of commerce (for instance when establishing the domicile of a company or a legal person).

Under these circumstances, perhaps out-of-court dispute settlements would constitute a valid alternative to the conventional court system. In this manner, the issues discussed above may be successfully tackled; Especially in the event these bodies would be specialised in e-commerce transactions, the issue of time-consuming procedures could come to a sound solution. For instance, one can imagine that in this case the proceedings will be conducted through electronic mail, thus saving time and costs. The efficiency of this solution will be expressed also in terms of reduced costs for the parties and certainty as to where in the world can a distributing company be sued, regardless of the fact that it conducts businesses on a global scale. Likewise, being a specialised body, issues such as the domicile of a company or a legal person can be tackled through the development of clear jurisprudence rules, thus adding to the certainty of law in the area of e-commerce.

The Virtual Magistrate Project

Such an out-of-court dispute settlement body specialised in computer-related conflicts does not represent a completely new idea; The Virtual Magistrate Project (“VMP”)²¹ was established in 1996 in a joint effort of the Villanova Centre for Law and Information (part of the Villanova University School of Law, Pennsylvania, USA), the American Arbitration Association, the Cyberspace Law Institute, while the funds were provided by the National Centre for Automated Information Research. The aim of this pilot initiative is to provide quick arbitration solutions for disputes arising out of the use of computer networks.

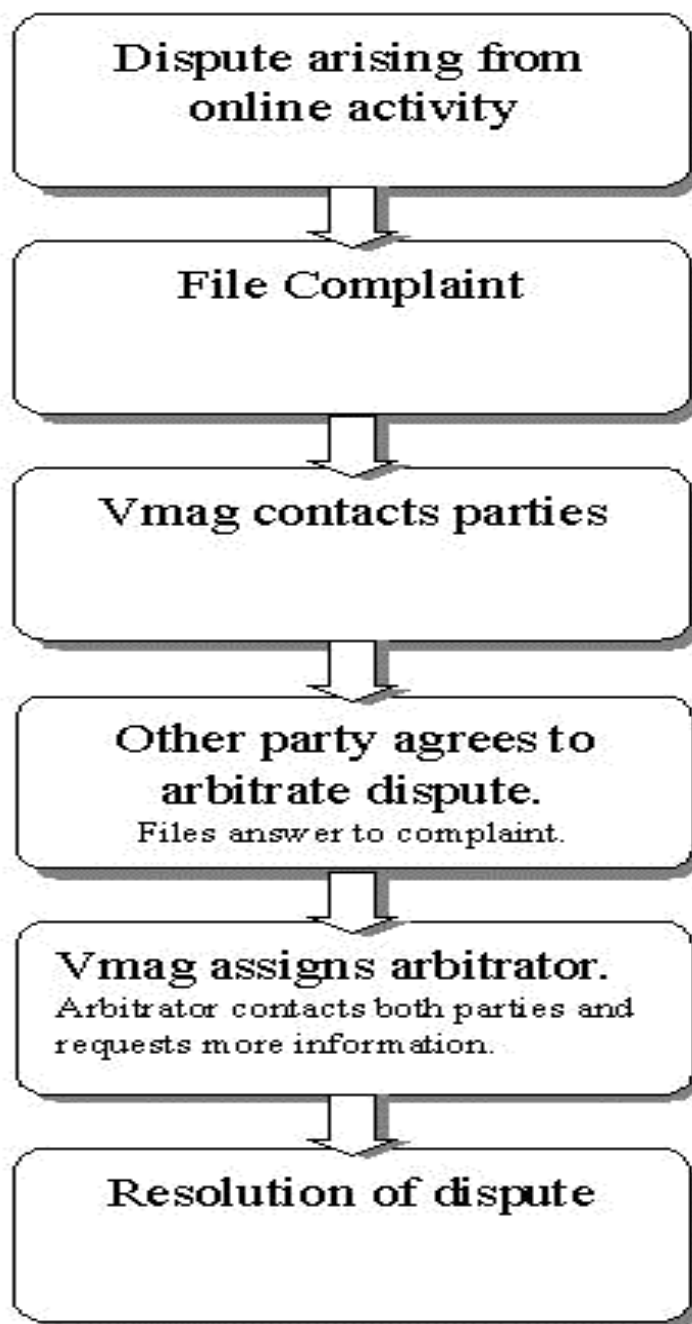
The proceedings before this arbitration body are conducted in the following manner (See also the table below): The complaint is submitted to the VMP via e-mail or a special form designed for this purpose. Subsequently, one or three arbitrators are randomly chosen from a pool of professional magistrates. The dispute is then referred to his or her judgement and, after hearing from the parties, a decision is rendered in a maximum of 72 hours from the moment the complaint has been accepted. The magistrate can issue, if need be, interim decisions. Interestingly enough, the concept paper of this project²² states that:

²¹ See the Virtual Magistrate Project at <http://www.vmag.org/>

²² See The Virtual Magistrate Project, Concept Paper, at <http://www.vmag.org/docs/concept.html>

“In making a decision, the Virtual Magistrate Project will not automatically apply the law of any specific legal jurisdiction. It will consider the circumstances of each complaint, the views of the parties about applicable legal principles and remedies, and the likely outcome in any ultimate litigation or dispute resolution.”

In other words, very important is to introduce a choice of law clause in the initial contract, of course alongside a choice for the dispute settlement of VMP. Otherwise, the magistrate will take into account various criteria that despite the fact that might lead to a sound decision, do not contribute to the interests of the parties in certainty of law.



The decisions so rendered can be reconsidered but are not subject to appeal. Likewise, they are enforceable as any other decisions issued by private arbitrators.

Worth mentioning in this context is the fact that, being a cyberspace service, it can be accessed anywhere in the world. Therefore, for instance, one can imagine the situation whereby the supplier of software is domiciled in Brazil, the buyer in Belgium and the conflict is settled before a dispute settlement body such as the Virtual Magistrate Project.

Table I, Proceedings in the framework of the VMP; Source: <http://www.vmag.org/started.html>

Out-of-court dispute settlement in Europe

Having been aware of the importance of such mechanisms for the settlement of legal conflicts, particularly in cases the amount under dispute is of low value and the parties involved are of negligible size, the European Commission chose to refer to this matter in its draft proposal for a directive on electronic commerce²³:

“Member States shall ensure that, in the event of disagreement between an Information Society service provider and its recipient, their legislation allows the effective use of out-of-court schemes for dispute settlement, including appropriate electronic means.”

This legislative act has been recently adopted. However, the provision establishing the framework for the functioning of out-of-court dispute settlement bodies has been the subject of several modifications. It now reads as following:

“Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.”²⁴

Even though the change in the wording of the provisions seems quite marginal, it is the opinion of the author of this article that the amendment is more than a matter of language; If, in the first case, the directive lays down the *obligation* for the Member States to allow the existence of such out-of-court dispute settlement bodies, the adopted version merely prohibits Member States from limiting the jurisdiction of already available schemes as to exclude e-commerce disputes. Under these circumstances, it might have been more appropriate for the furtherance of such out-of-court arrangements had the initial wording been retained. Nevertheless, one may find it difficult to deny that the intention of the European legislator to promote the use of such out-of-court bodies is rather obvious. The explanatory memorandum makes it clear that the aim behind this provision is to facilitate “the setting up of effective cross-border alternative dispute resolution systems”²⁵. It is however for the national law to

²³ See Article 17, paragraph 1, Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, Commission Proposal COM (1998), 585 final, Brussels, 18.11.1998, at p. 5, *OJ No C030 p.4, 05.02.1999*

²⁴ See Article 17, paragraph 1, Directive on electronic commerce, *Official Journal L 178, 17/07/2000, p. 0014*.

²⁵ See Explanatory Memorandum, Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, Commission Proposal COM (1998), 585 final, Brussels, 18.11.1998, at p. 5, *OJ No C030 p.4, 05.02.1999*

prescribe the precise conditions under which such schemes may be mandated to try conflicts arising out of e-commerce contracts.

Paragraph 2 of the same provision, as enshrined in the proposal submitted by the Commission, makes it clear that Member States have to subject these bodies to several fair trial principles, among other independence and transparency, adversarial techniques, procedural efficacy, legality of the decision, freedom of the parties and their representation. The main difference between the text of Commission's proposal and the one eventually adopted has to do mainly with the extension of these principles to cover especially, but not limited to, proceedings in consumer disputes:

“Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.”²⁶

At the same time, instead of enumerating the principles which have to be abided by, the final version makes reference only to “adequate procedural guarantees”, a term that leaves more freedom for Member States to apply whatever principles otherwise available under their own national laws. One may therefore reasonably conclude that any suspicion that such bodies will not respect basic principles of due process is unfounded.

Moreover, probably concerned with the rapidity with which a decision should be rendered the drafters of this directive state in the explanatory memorandum that, specifically for Internet disputes, the settlement of such conflicts could take place electronically.

According to the information available at this stage, only a limited number of such specialised out-of-court dispute settlement bodies are currently functioning in Europe. Once established, such schemes will be able to operate on a larger scale than the territory of the European Community. Indeed, such a body will be capable of reaching a global audience. As a consequence, one may reasonably claim that the more established such a dispute settlement system is, the more global reach will enjoy. One may only hope that in a world where geographic boundaries can hardly be noticed, the so-called cyberspace, the use of such dispute settlements arrangements will facilitate the development of e-commerce as a viable alternative for conducting international transactions.

²⁶ See Article 17, paragraph 2 of the Directive on electronic commerce, as cited in note 20, *supra*.

VII. Conclusive remarks

The Internet was first developed in 1970's as a communication mean between universities and research schools in North America. From this point of view, it can be easily assimilated to the 17th century *Republiek der Letteren*²⁷ network developed among European scholars. The significant difference is, however, that the exchange of information system used in the past remained at the stage of a strictly academic-oriented network, whereas the Internet has evolved to entail a preponderantly commercial character.

This article has sought to shed some light in the area of international jurisdictional rules in conflicts arising out of e-commerce contracts. For this purpose, I have looked at an important legislative project to be adopted at the European Community level, namely the Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters. While providing a reasonable protection standard for consumers concluding e-commerce contracts, the regulation fails to address the issue of domicile of companies and legal persons conducting business activities through electronic means. This omission is even more evident in the business-to-business contracts, especially when it is difficult to establish the place of performance of the obligation in question.

One possible way to avoid these problems would be the inclusion of a forum choice clause in the initial contract. While being able to opt for the jurisdiction of a certain court, the parties may at the same time choose to solve their future dispute before an out-of-court panel. In this last case, the main peculiarity of e-commerce, namely efficiency in terms of time, may be preserved. In this context, the Virtual Magistrate Project may provide a viable model to be looked at when implementing article 17 of the Directive on electronic commerce.

Finally, allow me to add a final word on the law applicable by such dispute settlement bodies: Of course the will of the parties is in this case very important, and the panel will be bound by the choice of law agreed among the parties. If such a choice of law clause is missing, the body might look at the law of the forum or of another country, in accordance to the private international law rules applicable in that respective state. However, one can imagine the situation whereby an independent body of rules and regulations would be developed to apply only to legal relationships connected to the cyberspace. Such a development would not be

²⁷ See Dr. J.A.H.G.M. Bots, *Republiek der Letteren Ideal en Werhlijkheid*, Amsterdam, 1977

entirely surprising; After all, it would be something in the spirit of the *Mare Liberum*²⁸ theory developed by Hugo Grotius in the 17th century for the Law of the High Seas.

²⁸ See C.G. Roelofsen, The sources of Mare Liberum; The Contested Origins of the Doctrine of the Freedom of the Seas, in W.P. Heere (ed.), International Law and its Sources; Liber Amicorum maarten Bos, Deventer, 1988